Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO. 88-1634

UNITED STATES SUPREME COURT

October Term, 1988

LUEGINE WIGGINS,

Petitioner,

vs.

THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

DENNIS W. HARTLEY
DENNIS W. HARTLFY, P.C.
620 S. Cascade, Suite 103
Colorado Springs, CO 80903
(719) 635-5521

Attorney for Petitioner

A.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COLORADO COURT OF APPEALS ERRED IN NOT REVERSING THE TRIAL COURTS DENIAL OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE FROM THE UNLAWFUL DETENTION AND SEIZURE OF DEFENDANT, WIGGINS.

2. WHETHER THE COLORADO COURT OF APPEALS ERRED IN FAILING TO REVERSE THE TRIAL COIURT RULING FINDING THAT THE SEARCH AND SEIZURE OF THE GREY VINYL BAG AFTER DETENTION WAS REASONABLE.

3. WHETHER THE COLORADO COURT OF APPEALS ERRED IN FAILING TO REVERSE THE TRIAL COURTS ADMITTING THE STATEMENTS MADE BY MR. WIGGINS AT THE TIME OF HIS UNLAWFUL DETENTION.

B.

DESIGNATION OF PARTIES

All Parties in the Court whose judgment is sought to be reviwed are contained in the caption of the case in this Court.

C.

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D.

At trial in the Colorado District Court, Luegine Wiggins was convicted of Possession of Controlled Substances (cocaine) and sentenced to 32 years in the Colorado State Penitentiary. The conviction of petitioner was upheld in the Colorado Court of Appeals in the case of Colorado v. Wiggins, Case No. 86CR1444.

(Opinion of the Colorado Court of Appeals is attached to this Petition as Appendix A).

E.

JURISDICTIONAL STATEMENT

1. Opinion of the Colorado Court of Appeals was June 30. 1988.

2. Date of Rehearing - Filed: August 1, 1988.

3. Denied: August 25, 1988.

4. Petition for Writ of Certiorari to Colorado Supreme Court - Filed September 12, 1988.

5. Denied: January 9, 1989.

6. Statutory provisions confirming jurisdiction are 28 U.S.C. § 1257(3) and 28 U.S.C. § 1651

F.
CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

1. Constitutional Provisions

a. Amendment IV to the United States Constitution. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

b. Amendment V to the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; no shall any person be subject for the same offense to be twice put in jeopardy of life or limb; no shall be compelled in

any criminal case to be a witness against himself, or be deprived life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

G.
STATEMENT OF THE CASE

A. Whether the Colorado Court of Appeals erred in not reversing the Trial Court's denial of Defendant's Motion to Suppress evidence from the unlawful detention and seizure of Defendant, Wiggins.

On July 1, 1986, Officer Brown of the Colorado Springs Police Department received information regarding the whereabouts of Leroy Mackie, who was wanted on two felony warrants. Officer Brown also was informed as to what type of vehicle Leroy Mackie drove. Officer Brown proceeded to the location and waited in an unmarked car, dressed in plain clothes, until an individual fitting the description of Leroy Mackie got into the forementioned vehicle and drove away.

The suspect, Leroy Mackie, drove a short distance before stopping at a residence. Officer Brown drove by to get a better look at the suspect. After a short time, the suspect left that residence and Officer Brown continued his

surveillance. At one point, Officer Brown pulled up next to the suspect to get a better look at the suspect and to make sure it was Leroy Mackie. Officer Brown carried with him a picture identification of Leroy Mackie for comparison purposes. At this point, Officer Brown also realized there was a second individual in the car.

The suspect drove a little farther until he stopped in front of another residence. At this point, Officer Brown pulled up next to the suspect's car, drew out his gun, and shouted "keep your hands up where I can see them" and "get out of the car". The passenger was one Luegine Wiggins, the Petitioner in this case, who jumped out of the vehicle and proceeded to "duck" behind the car until Officer Brown identified himself as a law enforcement agent. At that point, Defendant, Wiggins, stood up, Officer Brown ordered Mr. Wiggins around the driver's side of the car, and Mr. Wiggins complied.

Before the stop Officer Brown had called backup units to assist him which showed up at this point. Officer Brown asked the suspect his name and suspect replied "Leroy Mackie", which led to the arrest, handcuffing, and then placing of Leroy Mackie in a police vehicle.

Officer Brown stated in a preliminary hearing that he had no information, tip or suspicion that there was any criminal activity taking place or about to take place, and he also had no "business" with the passenger.

Officer Brown then proceeded to ask Mr. Wiggins for identification, Mr. Wiggins leaned into the driver's side of the stopped vehicle and picked up a grey, vinyl bag and removed a wallet from within that bag. Mr. Wiggins presented Officer Brown with his driver's license. As Officer Brown was looking at the I.D., he stated that he did not recognize Mr. Wiggins. Officer Brown later stated in a preliminary hearing that he has known Mr. Wiggins for over a year

through other charges against Mr. Wiggins, including recent conviction (prior to this incident). Officer Brown looked back at the I.D. and allegedly saw Mr. Wiggins putting his hand back into the vinyl bag, whereupon Officer Brown asked for the bag and then grabbed the bag without Mr. Wiggins' permission. Officer Brown had no visual indication or articulable suspicion that Mr. Wiggins was armed.

As a result of this seizure, Officer Brown observed what he suspected to be cocaine in small, clear plastic baggies inside the grey, vinyl bag. Officer Brown then questioned Mr. Wiggins regarding the contents and ownership of the vinyl bag. Mr. Wiggins was not yet advised of his Miranda rights. Officer Brown called his supervisor who instructed Officer Brown to arrest Mr. Wiggins for Possession of a Schedule II Controlled Substance.

In three separate motions, Mr. Wiggins moved to suppress: all evidence obtained as a

result of his arrest and detention; all evidence obtained from the seizure of a grey vinyl bag; and all statements Mr. Wiggins made during his detention. These are the same three issues set forth in this petition.

A hearing on Mr. Wiggins' Motions to Suppress was held on September 17, 1987. The Honorable William E. Rhodes, Judge, in Division 4 of the El Paso County District Court denied all of Mr. Wiggins' Motions to Suppress.

On May 30, 1987, Mr. Wiggins stood trial on the charge of Possession of a Controlled Substance. The jury found him guilty of Possession of a Controlled Substance.

The defense then took an appeal which affirmed the decision of the trial, and a subsequent Petition for Rehearing was denied.

On appeal, the Colorado Court found that the detention of Mr. Wiggins, the defendant, was warranted when defendant hastily existed from the stopped vehicle and then proceeded in

"ducking down behind the car". The Court found that Officer Brown lawfully took reasonable action to insure that Mr. Wiggins did not present a safety threat. Terry v. Ohio, 392 U.S. 1 (1968).

The general rule provides that any evidence seized from defendant in violation of his Fourth Amendment rights is excluded from a criminal trial and fruits of such evidence are excluded as well. Alderman v. United States, 394 U.S. 165 (1969). If a defendant is subjected to an unconstitutional arrest or detention, any evidence resulting from the initial illegality is suppressible.

The stop of the vehicle itself is not disputed as a justifiable and lawful stop due to the fact that Officer Brown recognized that the driver, Mackie, was wanted on felony warrants. Officer Brown recognized the driver of the vehicle to be Leroy Mackie, who is wanted on outstanding warrants, therefore Officer Brown stopped the automobile.

Even Officer Brown stated in a preliminary hearing that Mr. Wiggins' actions weren't unreasonable considering that Mr. Wiggins probably failed to realize that this man (Officer Brown) who was dressed in plain clothes, driving an unmarked automobile and pointing a gun at him, was a law enforcement officer.

Seizure occurred with the detention of the vehicle by Officer Brown to make a formal identification by Leroy Mackie. Colorado v. Bannister, 449 U.S. 1 (1980). Detention of Wiggins occurred when Officer Brown ordered Wiggins to (1) put his hands where Officer Brown can see them, (2) get out of the car, and (3) to come around the side of the car where Officer Brown could see him.

By Officer Brown's own admission, there was no information, tip or suspicion that Mr. Wiggins committed, was committing, or about to commit any criminal activity. The only suspicious activity by the unarmed defendant was his hasty

exist from the vehicle after Officer Brown, who had not yet identified himself, pointed a gun at him.

In view of the circumstances, Mr. Wiggins' response was reasonable. However, once Officer Brown identified himself as a law enforcement agent, Mr. Wiggins' responded with full cooperation and compliance. With cessation of Wiggins' evasive actions, so ceased any perceived safety threat. The fact that Mr. Wiggins was stopped while in the company of Leroy Mackie cannot be used by Officer Brown to determine if Mr. Wiggins still poses safety threat since it is unconstitutional to abridge or violate a person's right on a guilt by mere association premise. United States v. Chadwick, 433 U.S. 1 (1977). Officer Brown did exactly this when he stated in a preliminary hearing that "the passenger was inside of a motor vehicle with a party wanted on a warrant and I wanted to formally identify the person so I would know who he was and what he was doing".

Defendant concedes that Officer Brown had a legitimate interest in detaining and safely arresting Leroy Mackie and does not dispute the officer's need to detain Mr. Wiggins to secure and effectuate the arrest of Mackie. However, the United States Constitution as well as case law, draws the line where the character of the detention was not reasonable.

The Fourth Amendment governs "seizures" of the person which do not result in a trip to the police station, and also when the police officer, by means of physical force or a show of authority, has in some way restrained the liberty of a citizen we may conclude that a "seizure" has occurred. Terry v. Ohio, 392 U.S. 1, 16 (1968). In Mr. Wiggins case, Officer Brown showed his authority by drawing his gun and ordering Mr. Wiggins to comply with several instructions.

A person has been "seized" within the meaning of the Fourth Amendment when, in view of all of the circumstances surrounding the

incident, a reasonable person would have believed that he was free to leave is to be determined form the circumstances as they unfolded before the defendant. United States v. Ceballos, 812 F.2d 42, 46-47 (2nd Cir. 1987).

When examining the circumstances surrounding the incident, the Court should look to several factors which could include: the suspect's age, education and intelligence; the number of police officers present; the display of weapons by officers; and the use of language and/or tone of voice indicating that compliance with the officer's request might be compelled. In the presence of such evidence, the contact between a member of the public and the police officer can amount to a seizure of that person. United States v. Mendenhall, 446 U.S. 544, 544-555 (1980); United States v. Puglisi, 723 F.2d 779, 783 (11th Cir. 1984).

In Mr. Wiggins' circumstances, all of the above mentioned factors are applicable. Mr.

Wiggins' education and intelligence is measured by a seventh-grade education. The number of police officers present was at least two units, if not three. Officer Brown not only displayed his weapon, he pointed it at Mr. Wiggins and Leroy Mackie. The officer's use of language and tone of voice constituted a purposeful and substantial limitation of the defendant's movements compelling him to comply with the officer's requests.

When Officer Brown detained Mr. Wiggins for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. "In the absence of any basis for suspecting [defendant] of misconduct, the balance between the public interest and [defendant's] rights to personal security and privacy tilts in favor of freedom from police interference. Brown v. Texas, 443 U.S. 47, 50 (1979).

The detention and seizure of the defendant in this case was illegal and in violation of his

Fourth Amendment rights. Officer Brown in this case did not have probable cause to detain the defendant. In fact, Officer Brown was not even in possession of a mere suspicion of criminal activity on the part of the defendant.

In this case, all suspicions or apparent probable cause where directed towards the driver of the vehicle, Leroy Mackie. The only thing Officer Brown could point to in this case was the defendant's hasty exit from the vehicle after the vehicle was stooped, and in light of the surrounding circumstances involving Officer Brown's action, it was a reasonable response by the defendant.

Therefore, the trial court erred in failing to suppress the evidence obtained as a result of Mr. Wiggins' detention.

B. Whether the Colorado Court of Appeals erred in failing to reverse the Trial Court's ruling finding that the search and seizure of the grey vinyl bag after dentention was reasonable.

Defendant's pre-trial motion to suppress evidence obtained as a result of the unlawful

seizure of the grey vinyl bag was denied by the Trial Court, and then the Court of Appeals concluded that Officer Brown's seizure of the bag was justified for personal safety reasons.

The unlawful detention of Mr. Wiggins was followed by the unlawful seizure of the grey vinyl bag in his possession. This seizure violated his right to protection from unreasonable searches and seizures under Amendment IV of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A privacy interest consists of a reasonable expectation that uninvited and unauthorized persons will not intrude into a particular area. One may freely admit guests of one's choosing--or be legally obliged to admit specific persons--

without sacrificing one's expectation that a space will remain secure against all others. An expectation of privacy, overall, consists of a belief that uninvited people will not intrude in a particular way. United States v. Lyons, 706 F.2d 321, 325-326 (D.C. Cir. 1983).

While most courts have generally followed the majority position in New York v. Belton, 453 U.S. 454 (1981), many courts have drawn the line at the point the arrestee is no longer withing the "immediate control or reach" of the passenger compartment.

The arrestee's remoteness from the vehicle, the absence of any taint of suspicion or wrongdoing or threat from Mr. Wiggins, balanced against the location of the search and nature of the invasion clearly removes this case from the holding in Belton and its progeny and indicates that Mr. Wiggins was subjected to an unwarranted and Constitutionally violative detention and search. Possibly the strongest factor

distinguishing this case from the Belton line of cases is the fact that defendant, Wiggins, was an unarrested passenger possessing a personal container outside the vehicle in question. Officer Brown conceded that he had no suspicions of criminal activity on the part of Mr. Wiggins, nor did he have any business with Wiggins. In this situation, there is no right under Belton to search the container. United States v. Vaughan, 670 F.2d 323 (D.C. Cir. 1982) (where court held Belton was not applicable to unarrested passenger's container possessed outside the vehicle).

Defendant's right to invoke these privileges directly arises from his standing to challenge the legality of the search and seizure. Standing is determined by considering whether the defendant had a legitimate expectation of privacy in the places searched and the items seized. Mr. Wiggins' actions clearly indicated his expectations of privacy regarding the bag's contents. First,

he personally retrieved it, maintained physical control over it, and provided Officer Brown with only what he specifically demanded.

The United States Supreme Court has recognized that luggage is typically a repository of personal effects. Robbin v. California, 453 U.S. 420 (1981), providing the owner of the luggage with a heightened expectation of privacy.

Mr. Wiggins did not voluntarily abandon the vinyl bag. Thus, the loss of standing attributable to voluntary abandonment of property is inapplicable in this case. United States v. Jones, 707 F.2d 1169 (10th Cir. 1983).

The general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking an exemption from the requirement to show the need for it. Chimel v. California, 395 U.S. 752, 762 (1969). The search without a warrant can survive constitutional inhibition only upon a showing that the surrounding facts brought it

within one of the exceptions to the rule that a search must rest upon a search warrant. Stoner v. California 376, U.S. 483, 486 (1964).

Officer Brown, in the case at hand, stated that personal safety required seizure of the vinyl bag from Mr. Wiggins. There was no crisis and Officer Brown did not suspect Mr. Wiggins of any criminal activity, requiring a weapons search. New York v. Class, 475 U.S. 106 (1986). He did not suspect Mr. Wiggins was armed and dangerous. Nor did he have any visual indication that there was a weapon inside the vinyl bag.

Officer Brown in this case claims to have seized the grey vinyl bag due to exigent circumstances. The exigent circumstances exception to a warrantless search is the "catch-all" exception allowing any police officer to seize property in question when Officer Brown claims that the defendant reached into the container and Officer Brown then feared for his safety so Officer Brown snatches the property away from the defendant.

The exigent circumstances exception holds the government to bear the burden of demonstrating that exceptional circumstances justified a departure from the normal procedure of obtaining a warrant. The government must produce specific and articulable facts to justify the finding of exigent circumstances. United States v. Alvarez, 810 F.2d 879, 881 (9th Cir. 1987).

First, if Officer Brown truly considered Wiggins' actions to be a life threatening emergency warranting a warrantless search and seizure, he would not have let Wiggins put his hand in the bag at the first time, when Wiggins needed to get his wallet out.

Defense contends that the following chain of events led to the unlawful seizure of the grey vinyl bag. Once Mr. Wiggins provided Officer Brown with identification, Officer Brown then recognized Mr. Wiggins and recalled that Mr. Wiggins had just been recently convicted on a

separate charge. Officer Brown stated that he had known Mr. Wiggins for about a year. Officer Brown also stated that Mr. Wiggins was the passenger in a motor vehicle with a party wanted on a warrant, and he wanted to formally identify the person so he would know who the passenger was and what the passenger was doing. Officer Brown has obviously assumed the defendant's guilt with the mere association of Mr. Wiggins with Leroy Mackie, in combination with Mr. Wiggins' recent conviction.

In addition, if Officer Brown had actually considered Wiggins' actions to be dangerous, he would not have "asked" for th bag but simply snatched it away from the defendant. As stated above, there was no suspicion of danger or threat of danger, actually the claim of exigent circumstances was brought about by the officer's assumption that Mr. Wiggins was not only guilty by mere association with Leroy Mackie, but also due to the officer's knowledge of Mr. Wiggins' prior conviction.

Under the plain view doctrine, the seizure of evidence without a warrant is permissible if the government can show that: (1) the initial intrusion which afforded plain view was lawful; (2) the discovery was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the police officer. United States v. Tolerton, 669 F.2d 652 (10th Cir. 1982); United States v. Newton, 788 F.2d 1392, 1394 (8th Cir. 1986).

In this case, the first two tests were not met. First of all, the initial intrusion and detaining of Wiggins was unlawful as argued in "argument (A)" of this petition. Furthermore, the discovery was not inadvertent due to the above-stated facts, in addition to the fact that Officer Brown admits in his statement that when he grabbed the bag from Mr. Wiggins the bag opened up, under the officer's control, enough to see into it.

A police officer is not entitled to seize and search every person whom he sees on the street

or of whom he made inquiries. He must have constitutionally adequate, reasonable grounds for searching any person. In the case of self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. Sibron v. New York, 392 U.S. 40, 64 (1968).

The fact that a police officer's life might be in danger has been recognized by the United States Supreme Court as an exigent circumstance allowing a pat-down for weapons of a person reasonably believed to pose such a danger. A security search may be justified for similar reasons. However, the suspicion of danger must be clear and reasonable in light of all surrounding circumstances. Officers of the law are not given free reign to conduct security searches not he pretense that a dangerous situation might be imminent. United States v. Tabor, 722 F.2d 596, 598 (10th Cir. 1983).

Therefore, the search and seizure of defendant's personal effect in this case was unlawful and any evidence obtained as a result of these violations should have been suppressed by the trial court when they erred in failing to do so.

C. Whether the Colorado Court of Appeals erred in failing to reverse the Trial Court's ruling admitting the statements made by Mr. Wiggins at the time of his unlawful detention in violation of his rights under Amendment V of the United States Constitution.

On Appeal, the statements were found to be voluntary. The Court also found that although the focus was upon Mr. Wiggins after seizure and search of the vinyl bag revealed what Officer Brown believed to be an illegal and controlled substance, that the officer's question regarding ownership of the bag was not directed at self-incrimination, or a custodial interrogation requiring a Miranda advisement. Miranda v. Arizona, 384 U.S. 436 (1966).

As argued in defendant's accompanying issues in this petition, the initial detention and

seizure of the defendant and his personal effect were unlawful. Therefore, any evidence, including the statements at issue in this motion, were fruits of the poisonous tree and must be suppressed upon this basis. Wong Sun v. United States, 371 U.S. 471 (1963). Furthermore, no independent intervening circumstances (i.e. an advisement of Miranda rights) existed so as to purge the taint resulting from the initial illegalities.

However, independent of the initial unlawful intrusion, the statements given by defendant, Wiggins, in this case were illicited involuntarily as a result of a custodial interrogation.

The Miranda safeguards provide an accused protection against compelled self-incrimination which is the result of custodial interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980). The Supreme Court in Innis defined custodial interrogation as either express questioning or its functional equivalent. The functional equivalent of questioning consists of:

> any words or actions on the part of the police [other than those normally attendant to arrest and custody] that the police should know are reasonably likely to elicit an incriminating response from the subject. Innis at 301.

An "incriminating response" refers to any response that the prosecution may seek to introduce at trial. Innis. Thus, the critical inquiry is whether the defendant, while in police custody, was exposed to a risk of self-incrimination by police interrogation.

The proper standard for judging the legality of questioning without Miranda advisement is not whether Officer Brown considered the person a suspect or expected an incriminating response to the inquiry, but rather whether the person was in custody at the time of the inquiry.

In determining whether a person is in custody, the question is whether a reasonable person in the suspect's position would consider himself significantly deprived of his liberty, or whether the suspect felt he was free to leave at

any time. A court must consider the totality of the circumstances under which the questioning was conducted, including: (1) the time, place and purpose of the encounter; (2) the words spoken by Officer Brown to the defendant; (3) the officer's tone of voice and general demeanor; (4) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; (5) whether directions were given to the defendant during the interrogation; and (6) defendant's verbal or nonverbal response to such directions.

Accordingly, it is overwhelming clear that Mr. Wiggins was in custody during interrogation. The facts in this case, in relevance to the totality of circumstances mentioned above, immediately show the restraints put on Mr. Wiggins while he was held at the scene by gunpoint. Without question, the officer's tone of voice and demeanor was such that both the arrestee and the passenger, Wiggins, felt compelled to comply

under threat of being shot. The fact that such inquiry took place at gunpoint indicated that the mood was less than friendly and did not suggest that Officer Brown did not expect a response to his inquiry. Further, the gun was a compelling form of restraint which did not allow Mr. Wiggins to feel free to leave.

Finally, when Officer Brown seized the bag from Wiggins and determined it contained an illegally controlled substance, the focus shifted from ensuring a safe, lawful arrest of Leroy Mackie and centered on Mr. Wiggins. Subsequent questions regarding ownership of the bag were directed at eliciting an incriminating response. Where a police officer intends to elicit an incriminating response from the defendant, the officer's initial question to the defendant constitutes custodial interrogation.

All statements elicited from this unlawful interrogation must be suppressed. The critical inquiry is not whether the police considered the

defendant a suspect, but whether the defendant was exposed to a risk of self-incrimination by the interrogation.

At this point, it appears that a factual controversy exists as to whom initiated the conversation in "an isolated location". In any case, it is uncontroverted that the arresting Officer Brown initiated the line of questioning regarding the suspected cocaine in the vinyl bag. It is also clear that at no time during the above-described custodial interrogation was defendant, Wiggins, advised of his Miranda rights so as to afford him an intelligent and voluntary waiver of those rights.

The questioning violated Mr. Wiggins' right against self-incrimination, under the Fifth Amendment of the United States Constitution contrary to well-established case law regarding a defendant's right against compelled self-incrimination which is the result of custodial interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980). An interrogation is custodial when

initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom of action in any significant way. The test when a person is in custody for Constitutional purposes is whether a reasonable person in defendant' circumstances would have believed he was free to leave the officer's presence.

In this case, defendant's belief that he was not free to leave the officer's presence was more than reasonable under the circumstances. At that point, the officer's questioning turned from identification to interrogation, with the purpose of incriminating Mr. Wiggins, he was constitutionally entitled to an advisement of his Miranda rights prior to interrogation. Such an advisement is required because this questioning went to heart of an element of proof of possession of a controlled substance. Mr. Wiggins did not feel free to leave for fear of being shot if he tried. And, finally as a result of these circumstances,

Mr. Wiggins felt compelled to answer. Therefore, any response by Mr. Wiggins was self-incriminating and should have been suppressed by the court.

Officer Brown in this case elicited incriminating statements from defendant, Wiggins, pursuant to a custodial interrogation. These statements were elicited without advising defendant of his Miranda rights and for the purpose of eliciting incriminating evidence. As such, these statements resulted from a violation of defendant's Fifth Amendment rights, and must, therefore be suppressed from evidence. Further, the unlawful detention and seizure of defendant and his personal effects renders the subsequent statement suppressible as unlawful fruits.

H. REVIEW OF JUDGMENT

Review is sought of a judgment of the Colorado Court of Appeals and not state court action is involved.

I. BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The Petitioner has been denied rights under the United States Constitution, Amendment IV and Amendment V, so it is a federal constitutional question.

J. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Allowance for the Writ of Certiorari should be had in this case for the reason that the Petitioner is relying on violations of his Constitutional rights (Amendments IV and V).

K. APPENDIX LIST

Appendix A - Judgment Affirmation by Colorado Court of Appeals, June 30, 1988.

Appendix B - Order denying rehearing by the Court of Appeals of Colorado, August 25, 1988.

Appendix C - Order denying Certiorari by the Supreme Court of Colorado, January 9, 1989.

Respectfully submitted,

DENNIS W. HARTLEY #0788
DENNIS W. HARTLEY, P.C.
A member of the Bar of this Court
620 S. Cascade, Suite 103
Colorado Springs, CO 80903
(719) 635-5521

PROOF OF SERVICE

All parties required to be served in this action have been served a true and correct copy of this Petition for Writ of Certiorari by placing same in the United States Mail, postage prepaid, this 24th day of March, 1989, addressed as follows:

The Attorney General
1525 Sherman Street, 3rd Floor
Denver, CO 80203

APPENDIX A

COLORADO COURT OF APPEALS

NO. 87CA0721

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

LUEGINE WIGGINS,

Defendant-Appellant.

Appeal from the District Court
El Paso County
No. 86CR1444

Honorable William E. Rhodes, Judge

JUDGMENT AFFIRMED

DIVISION I
Opinion by JUDGE PLANK
Pierce and Tursi, JJ., concur

Defendant, Luegine Wiggins, appeals from a judgment entered upon a jury verdict finding him guilty of Possession of a Class II Controlled Substance. We affirm.

On July 1, 1986, Brown, a police officer, stopped a vehicle to identify the driver. Brown testified to the following facts.

He believed the driver to be an individual who was wanted on outstanding warrants. He had followed the vehicle several blocks before pulling alongside the vehicle in wwhich the defendant Wiggins was a passenger. Brown then ordered the driver to stop and keep his hands where the officer could see them. At that point the officer did not know the identity of the passenger in the vehicle. He ordered the driver to get out of the car. The driver exited the vehicle and passenger Wiggins jumped out of the car and ducked down. The officer was in plain clothes and was driving an unmarked police car. Brown determined the driver was the individual wanted and placed him under arrest.

Brown next asked the passenger for identification. the passenger reached into the car, picked up a gray vinyl bag and took out a wallet. Brown looked at the identification and observed that Wiggins had his hand back in the gray vinyl bag. brown seized the bag from

Wiggins. He saw several clear plastic bags inside the vinyl bag. The plastic bags contained the controlled substance. The bag was large enough to hold a small gun or knife. Wiggins told the officer he wanted to get something out of the bag. Brown asked what Wiggins wanted and stated he would get it for him. Wiggins then stated the bag was not his.

Defendant testified at the suppression hearing and disputed certain facts stated above. The court elected to accept the testimony of Brown.

Defendant alleges his detention and arrest were unlawful and any evidence obtained from the police conduct should have been suppressed. Further, the defendant alleges certain statements of his were obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and certain exculpatory evidence was destroyed by the police. We disagree.

Initially, the Defendant does not dispute Brown's right to stop the vehicle to determine the identity of the driver and arrest the driver if he was the individual wanted on two warrants. Brown properly arrested the driver.

When the defendant "jumped" out of the car, the officer lawfully could take reasonable steps to insure the defendant was not a threat to the officer's safety. Brown could have properly "frisked" the defendant. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); People v. Casias, 193 Colo. 66, 563 P.2d 926 (1977).

Wiggins' jumping and ducking actions supported the officer's request for identification. When the defendant put his hand back in the vinyl bag, the officer could seize the bag for his own protection. We conclude the officer's action was justified and the search reasonable under these circumstances.

Brown further testified the defendant spontaneously pointed to a plastic bag outside of the vehicle and advised the officer he had just purchased the bag from the driver. The defendant's statements pertaining to the purchase of the plastic bag and earlier statement denying ownership fo the vinyl bag were not a result of interrogation by the officer requiring a Miranda advisement. When the officer asked the defendant what he wanted from the bag it was not an inquiry suggesting the officer expected an incriminating response. See People v. Lee, 630 P.2d 583 (Colo. 1981), cert. denied, 454 U.S. 1162, 102 S.Ct. 1036, 71 L.Ed.2d 318 (1982); People v. Lowe, 200 Colo. 470, 616 P.2d 118 (1980).

Wiggins argues the destruction of the police dispatch tape containing the conversation between Brown and his supervisor requires dismissal of the charge. We disagree. At the time the

defendant requested the tape, the police had erased the same, pursuant to their standard procedure. The defendant failed to show the tape possessed an exculpatory value that was apparent to the police before it was erased. People v. Gann, 724 P.2d 1318 (Colo. 1986).

Judgment affirmed.

JUDGE PIERCE and JUDGE TURSI concur.

APPENDIX B

COLORADO COURT OF APPEALS

NO. 87CA0721

THE PEOPLE OF THE STATE OF COLORADO,	)
Plaintiff-Appellee,	)
v.	)
LUEGINE WIGGINS,	)
Defendant-Appellant.	)

Appeal from the District Court
El Paso County
No. 86CR1444

Honorable William E. Rhodes, Judge

ORDER

DIVISION I
Opinion by JUDGE PLANK
Pierce and Tursi, JJ., concur

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 9-26-88, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State

of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

DATED: 8-25-88

APPENDIX C

COLORADO SUPREME COURT

CASE NO. 88SC421

LUEGINE WIGGINS,	)
	)
Petitioner,	)
	)
v.	)
	)
THE PEOPLE OF THE STATE OF COLORADO,	)
	)
Respondent.	)

Certiorari to the Colorado Court of Appeals
86CA0721
El Paso County District Court
No. 86CR1444

Honorable William E. Rhodes, Judge

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS FURTHER ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 9, 1988.